

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

WILMER D. ORIGEL,

Case No. C-05-4633 JCS

Plaintiff(s),

v.

**ORDER DENYING DEFENDANT'S
MOTION TO DISMISS [Docket No. 16]
AND VACATING HEARING**

THE NORTHWESTERN MUTUAL LIFE
INSURANCE COMPANY,

Defendant(s).

Defendant filed a Motion to Dismiss (the "Motion") [Docket No. 16]. Defendant argued that this case should be dismissed based on an untimely service of process under Fed. R. Civ. P. 4(m) and the orders of this Court. The Court finds the Motion suitable for resolution without oral argument, and VACATES the hearing previously set for August 11, 2006, at 1:30 p.m. (The Case Management Conference set for the same date and time REMAINS ON CALENDAR.)

Under Fed. R. Civ. P. 4(m), service of process is required within 120 days after the filing of the complaint, or within such time as the court may order beyond that date. Under this rule, in the event that the plaintiff shows good cause for the failure to serve, the court is required to extend the time for service of process for an appropriate period of time. Even where good cause is not shown, the Court retains discretion to relieve Plaintiff of the consequences of its failure. *See* Fed. R. Civ. P. 4(m) Advisory Committee's Note; *Oyama v. Sheehan*, 253 F.3d 507, 513 (9th Cir. 2001). In this case, the complaint was served one day after the deadline set by the Court.

The Court exercises its discretion and declines to dismiss the complaint. Plaintiff delivered the complaint for service of process on June 1, 2006, and requested "rush" service. Under these circumstances, the sanction of dismissal for service one day late is too harsh. Moreover,

1 Defendant's recitations of prejudice are far too general to demonstrate prejudice from this one-day
2 delay.

3 Accordingly, the Motion is DENIED.

4 IT IS SO ORDERED.

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6 Dated: August 4, 2006

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JOSEPH C. SPERO
United States Magistrate Judge